

SENATE JUDICIARY COMMITTEE SUBSTITUTE FOR
SENATE BILL 203

47TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2005

AN ACT

RELATING TO DOMESTIC RELATIONS; ADDING REQUIREMENTS FOR THE
APPOINTMENT OF A GUARDIAN AD LITEM

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 40-4-8 NMSA 1978 (being Laws 1977,
Chapter 286, Section 1, as amended) is amended to read:

"40-4-8. CONTESTED CUSTODY--APPOINTMENT OF GUARDIAN AD
LITEM- COURT-ORDERED MEDIATION. --

A. In any proceeding [~~for the disposition of~~
~~children~~] under this chapter when custody of a minor
[~~children~~] child is contested by [~~any party~~] either parent,
upon a showing of good cause, the court may appoint an attorney
at law as guardian ad litem, on the court's motion or upon
[~~application of any party~~] motion of either parent, to appear
for and represent the minor [~~children~~] child. The expenses,

1 costs and [~~attorneys'~~] professional fees for the guardian ad
2 litem [~~may~~] shall be allocated [~~among~~] between the parties as
3 determined by the court. In no event shall the court delegate
4 to the guardian ad litem the ultimate determination of the
5 child's best interests regarding custody or time-sharing under
6 Section 40-4-9 NMSA 1978. The guardian ad litem's cumulative
7 professional fees shall not exceed five thousand dollars
8 (\$5,000) unless approved by the court for good cause shown. In
9 determining whether an appointment will be made, the court
10 shall consider all relevant factors, including:

11 (1) the wishes of the parents;

12 (2) the age of the child;

13 (3) the contentiousness of the parties or
14 other dynamics affecting the child;

15 (4) the extent to which a guardian ad litem
16 will assist the court by providing factual information useful
17 to the court in determining a child's best interests; and

18 (5) the ability of the parties to pay.

19 B. A guardian ad litem appointed on or after
20 January 1, 2006 shall:

21 (1) be an attorney licensed to practice law in
22 New Mexico;

23 (2) have a minimum of five years experience in
24 the practice of law, with at least fifty percent of that
25 practice having been in family law or domestic relations

1 matters; and

2 (3) possess such other qualifications as
3 determined by the New Mexico supreme court to include training
4 in child development.

5 C. In all cases where a guardian ad litem has been
6 appointed before custody or time-sharing is decided by the
7 court, a child six years of age or older shall have the right
8 to petition to give testimony pursuant to Subsection C of
9 Section 40-4-9 NMSA 1978.

10 D. Every order appointing a guardian ad litem
11 shall:

12 (1) state the guardian ad litem's duties with
13 particularity either as determined by the court or by the
14 procedure set forth in Rule 11-706 of the New Mexico Rules of
15 Evidence;

16 (2) include the duration of the appointment,
17 which shall not exceed one year unless extended by the court
18 for good cause, applying the factors provided in Subsection A
19 of this section;

20 (3) state the professional fee the guardian ad
21 litem is authorized to charge and provide for the rendering of
22 itemized monthly statements to the parties and counsel;

23 (4) specify a guardian ad litem's duties and
24 responsibilities, including:

25 (a) conducting interviews with the child

1 face to face outside the presence of both parents and counsel
2 if the child is age six or older; conducting interviews of both
3 parents, conducting interviews of any preexisting therapist for
4 the child after obtaining the necessary authority for the
5 release of information; and conducting such other interviews of
6 persons at the guardian ad litem's or the court's discretion
7 after obtaining the necessary authorization for the release of
8 information;

9 (b) submitting a written report of
10 investigation, findings and recommendations as may be directed
11 by the court, which shall be filed of record at least fourteen
12 days before it is to be entertained by the court with copies
13 provided to both parents, each parent's counsel, all parties
14 and the court, except in case of emergency; and

15 (c) reporting to the court the child's
16 wishes, regardless of recommendations;

17 (5) specify that the guardian ad litem has no
18 authority to obligate the parents to pay the fees of any
19 therapist without the advance approval of both parents or the
20 court upon hearing; and

21 (6) specify that the guardian ad litem has the
22 right to call and examine witnesses.

23 ~~[B.]~~ E. When custody is contested, the court:

24 (1) shall as soon as practicable refer ~~[that~~
25 ~~issue to mediation if feasible unless]~~ the parties to domestic

1 relations mediation pursuant to the Domestic Relations
 2 Mediation Act. If a party asserts or it appears to the court
 3 that domestic [~~violence~~] abuse or child abuse has occurred [~~in~~
 4 ~~which event~~], the court shall halt or suspend mediation unless
 5 the court specifically [~~finds that~~] makes a finding under
 6 Subparagraphs (a), (b) or (c) of this paragraph. Mediation may
 7 occur if:

8 (a) the following [~~three~~] conditions
 9 [~~are satisfied~~] exist: 1) the mediator has substantial
 10 training concerning the effects of domestic [~~violence~~] abuse or
 11 child abuse on victims; 2) a party who is or alleges to be the
 12 victim of domestic [~~violence~~] abuse is capable of negotiating
 13 with the other party in mediation, either alone or with
 14 assistance, without suffering from an imbalance of power as a
 15 result of the alleged domestic [~~violence; and~~] abuse; and 3)
 16 the mediation process contains appropriate provisions and
 17 conditions to protect against an imbalance of power between the
 18 parties resulting from the alleged domestic [~~violence~~] abuse or
 19 child abuse;

20 (b) the court finds a lack of probable
 21 cause that domestic abuse or child abuse has occurred; or

22 [~~(b)~~] (c) in the case of domestic
 23 [~~violence~~] abuse involving parents, the parent who is or
 24 alleges to be the victim requests mediation and the mediator is
 25 informed of the alleged domestic [~~violence~~] abuse; and

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1 (2) may order, in addition to or in lieu of
2 the provisions of Paragraph (1) of this subsection, that each
3 of the parties undergo individual counseling in a manner that
4 the court deems appropriate. ~~[if the court finds that the~~
5 ~~parties can afford the counseling; and~~

6 ~~(3) may use, in addition to or in lieu of the~~
7 ~~provisions of Paragraph (1) of this subsection, auxiliary~~
8 ~~services such as professional evaluation by application of Rule~~
9 ~~11-706 of the New Mexico Rules of Evidence or Rule 1-053 of the~~
10 ~~Rules of Civil Procedure for the District Courts.~~

11 ~~C.]~~ F. As used in this section:

12 (1) "child abuse" means:

13 (a) that a child has been physically,
14 emotionally or psychologically abused by a parent;

15 (b) that a child has been: 1) sexually
16 abused by a parent through criminal sexual penetration, incest
17 or criminal sexual contact of a minor as those acts are defined
18 by state law; or 2) sexually exploited by a parent through
19 allowing, permitting or encouraging the child to engage in
20 prostitution and allowing, permitting, encouraging or engaging
21 the child in obscene or pornographic photographing or filming
22 or depicting a child for commercial purposes as those acts are
23 defined by state law;

24 (c) that a child has been knowingly,
25 intentionally or negligently placed in a situation that may

1 endanger the child's life or health; or

2 (d) that a child has been knowingly or
3 intentionally tortured, cruelly confined or cruelly punished;
4 provided that nothing in this paragraph shall be construed to
5 imply that a child who is or has been provided with treatment
6 by spiritual means alone through prayer, in accordance with the
7 tenets and practices of a recognized church or religious
8 denomination, by a duly accredited practitioner of the church
9 or denomination, is for that reason alone a victim of child
10 abuse within the meaning of this paragraph; and

11 (2) "domestic ~~[violence]~~ abuse" means ~~[one~~
12 ~~parent causing or threatening physical harm or assault or~~
13 ~~inciting imminent fear of physical, emotional or psychological~~
14 ~~harm to the other parent]~~ an incident by a household member
15 against another household member resulting in:

- 16 (a) physical harm;
17 (b) severe emotional distress;
18 (c) bodily injury or assault;
19 (d) a threat causing imminent fear of
20 bodily injury by any household member;
21 (e) criminal trespass;
22 (f) criminal damage to property;
23 (g) repeatedly driving by a residence or
24 work place;
25 (h) telephone harassment;

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- (i) stalking;
- (j) harassment; or
- (k) harm or threatened harm to a child. "

underscoring material = new
[bracketed material] = delete